



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/25904/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 26 January 2018

Decision & Reasons Promulgated  
On 8 June 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDRES IVAN GUADALUPE GUACHAMIN  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. The Secretary of State appeals with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated on 17 November 2017 allowing the appeal of the respondent against the Secretary of State's decision of 17 May 2016 to deport him from the United Kingdom.
2. I shall refer hereafter to Mr Guadalupe Guachamin as the appellant, as he was before the First-tier Judge, and to the Secretary of State as the respondent.
3. I explained to the appellant the difficulties he might experience in trying to defend the judge's decision against an error of law challenge bearing in mind that he is not legally

represented and has no legal qualifications himself. He gave the matter consideration but concluded that he wished to go ahead today since he had made regular efforts to find legal representation and had been unable to do so.

4. In the decision letter the Secretary of State concluded that it was conducive to the public good to make a deportation order against the appellant. She concluded that he is a persistent offender, because since his claimed arrival in the United Kingdom on 21 August 1999 he had amassed five convictions on seven offences which included attempted burglary with intent to steal, affray, possession of controlled drugs – class B, failing to comply with the community requirements of a suspended sentence and destroying or damaging property as well as coming to the attention of the Metropolitan Police on a further nine occasions. It was therefore the case in accordance with paragraph 398 of HC 395 that the public interest required his deportation unless an exception to deportation applied. It was concluded that no such exception existed in this case.
5. The judge gave careful consideration to the evidence of the appellant, his partner and PC Katie Jarvis, and said at paragraph 68 that it was not accurate to assess the appellant as a persistent offender and went on in the alternative to consider paragraph 399 of HC 395. She concluded that he was not a professional criminal nor did she consider him to be dangerous as the respondent claimed. The appeal was allowed.
6. In her grounds of appeal the respondent argued that the judge had erred in finding the appellant not to be a persistent offender. Reference was made to the decision of the Upper Tribunal in Chege [2016] UKUT 187 (IAC), noting that at paragraph 75 what was said by the judge was not relevant to a proper definition of “persistent offender”. It was argued that it was quite clear from Chege that the appellant’s offences meant he fell squarely within the definition of “persistent offender” and the judge had erred by not referring to it in her overall assessment.
7. The point was also made that the judge appeared to have relied on a concession by the Presenting Officer which was denied. It was not noted in the Record of Proceedings or in the Presenting Officer’s own appeal hearing minute and was not referred to elsewhere in the determination. The judge considered that if wrong about the submission the crimes were not “the most serious” and had not warranted a term of imprisonment but again it was argued that these were irrelevant factors when one had regard to the guidance in Chege. It was argued that the reasoning was inadequate bearing in mind that the appellant had continued to offend despite a deportation order and the birth of two children.
8. Permission to appeal was granted on all grounds.
9. In her submissions Ms Fijiwala relied on the grounds. The issue of “persistent offender” was crucial to the outcome of the appeal. The judge had said at paragraph 71 that it would not be unduly harsh for the appellant to return to Ecuador and his partner and children to remain in the United Kingdom without him so if he had been found to be a persistent offender then he would have found that he did not meet one

of the exceptions. It was clear also that the issue had been part of the Secretary of State's case and therefore it was unclear why the judge referred at paragraph 73 to a submission which he said in effect amounted to a concession. In any event concern was rather with the inadequacy of the findings about whether or not the appellant was a persistent offender. There was a lack of reasoning by the judge. There was simply a statement at paragraph 73. It was true that the judge had said a little more at paragraph 68, but this was not adequately reasoned especially bearing in mind the case law. It was also the case that the finding at paragraph 75 lacked reasoning. The judge had not taken into account the guidance in Chege, a copy of which had been put in. The term was defined at paragraph 37 in that judgment, and this was analysed further at paragraph 51. The appellant had offended over the period of 2009 to 2016, the reference at paragraph 57 in Chege to people with an alcohol or drug dependency was irrelevant to the appellant and this was not considered by the judge. There was also the reference to rehabilitation at paragraph 60 which again had not been considered. Since the deportation had been brought into effect it had not acted as a deterrent and nor had it despite the coming into his life of his partner and the children. This has not been factored into the findings. There was an error of law.

10. In his submissions the appellant said that he had committed quite a lot of incidents but they were minor as the judge had said when he had not been sentenced to prison. He had made a lot of mistakes; there had been quite a few incidents but they were in the past and he was trying to turn his life around. He had not had a father and had no one in his life and he did not want that for his children. The incidents had been quite minor. On the last occasion when he was arrested someone had stolen his shoes when he was asleep on a bus and he had had to go to hospital having been stabbed on his hand. His use of drugs had only been recreational and he was not that type of person anymore. He was now studying at university. He wanted to work but could not because of his signing on hours as it could not be fitted around a full-time job. That was the only reason stopping him doing full-time work.
11. If he were removed from the United Kingdom it would make a lot of impact on his whole family especially his children. He knew nothing about Ecuador and only knew about the United Kingdom. He did not speak the language of Ecuador. It put him in danger and he would not last two weeks there. He was not a persistent offender and not a danger to the public.
12. By way of reply M Fijiwala said that the points made by the appellant did not deal with the judge's findings which it was argued were inadequate.
13. By way of reply the appellant said that he was not a danger to the public and had committed minor offences only and had never been in a bad position and it was a year or two since he had done anything basically. He was not a dangerous person. He was a different person now and he had changed his life around and was not even dangerous and he wanted to show his children he could be an example to them as a father.
14. I reserved my determination.

15. It is right to point out, as Ms Fijiwala did, that the issue of whether or not the appellant is a persistent offender is clear relevance in this case since in light of the findings at paragraph 71 by the judge if he were to be found to be a persistent offender he would not meet one of the exceptions.

16. Of clear relevance to the issue in this case is the decision of Mrs Justice Andrew sitting as an Upper Tribunal Judge in Chege. It was said at paragraph 51 that:

“However, Parliament did not use the phrase ‘repeat offender’ or ‘serial offender’. It used the phrase ‘persistent offender’, and persistence, by its very nature, requires some continuation of the behaviour concerned, although it need not be continuous or even regular. There may be circumstances in which it would be inappropriate to describe someone with a past history of criminality as being a ‘persistent offender’ even if there was a time when that description would have been an accurate one.”

17. The Tribunal went on to give the example of someone who had committed a series of offences between the ages of 14 and 17 but thereafter led a blameless life for twenty years. He could not now be described as a persistent offender. The Tribunal went on to say at paragraph 53:

“Put simply, a ‘persistent offender’ is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or up to a certain time before it, or that the continuity of the offending cannot be broken. ... Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.”

18. The appellant’s offending history is set out at paragraphs 4 to 16 of the refusal decision. On 15 August 2009 he was convicted at Wood Green Crown Court of attempted burglary with intent to steal. He was sentenced to seventeen weeks in prison wholly suspended and 36 hours at an attendance centre. On 9 September 2010 he was convicted at Thames Magistrates’ Court of affray and sentenced to twenty weeks in prison wholly suspended, the supervision requirement, a ten day activity requirement and ordered to pay £85 in costs. On 2 March 2011 he was convicted of possessing a controlled drug – class B – cannabis and failing to comply with the community requirements of a suspended sentence order. On the first count he was fined £50, ordered to pay £40 costs and a £15 victim surcharge. On the second count he was sentenced to a ten day, consecutive, activity requirement added to the conviction of 9 September 2010. On 24 April 2012 he was convicted of possessing a controlled drug – class B – cannabis and sentenced to a twelve month conditional discharge and ordered to pay £85 in costs. And on 30 August 2016, he was convicted at East London Magistrates court on two counts of destroying or damaging property in which he was issued with a community order until 29 August 2017, issued with an unpaid work

requirement of 160 hours, ordered to pay £85 costs, and £85 victim surcharge and £100 compensation.

19. This record has to be seen in light of the guidance in Chege. As was argued by Ms Fijiwala, there is minimal consideration of the relevant criteria in the judge's decision. Although she set out all of the convictions up to 2012 at paragraph 4 of her decision, she did not that it could be said that it showed an increased criminal lifestyle and the last conviction and sentence were the conditional discharge on 24 April 2012. The risk of damage to his girlfriend's phone and chair had not resulted in any criminal charges, it seems he was arrested for criminal damage, admitting the offence and interview and was given a caution, and he pleaded guilty in respect of damage to two buses in 2016, was charged and found guilty at court where he received a community order. The judge considered it was not accurate to assess him as a persistent offender and she repeated this conclusion at paragraph 73 and in effect at paragraph 75.
20. I consider that the analysis of whether or not the appellant is a persistent offender was inadequate, failing as it did to take accounts of guidance in Chege in particular the point set out at paragraphs 51 and 53 of that decision. I do not consider that these errors can be regarded as immaterial, for the reasons set out above. Accordingly there will require to be a fresh hearing of the First-tier Tribunal in which all relevant matters including of course this one will have to be reconsidered by a different judge. The Secretary of State's appeal against the First-tier Tribunal's decision is therefore allowed.

No anonymity direction is made.



Signed

Date 30 April 2018

Upper Tribunal Judge Allen